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ABSTRACT

Enacted as a part of the Rehabilitation Act of 1973, Section 504 states, "No otherwise qualified individual with handicaps...shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Prior to 1990, Section 504 contained an amendment that stated drug and alcohol use were physical or mental impairments. Under this amendment, students who were current drug or alcohol users fit the definition of "handicapped." This document describes the history of section 504, discusses problems with the section, and includes recent amendments. The 1990 amendments narrow the definition of "handicapped" to exclude students who are currently engaging in the illegal use of drugs. The amendments also give districts the authority to take the same disciplinary action against any handicapped student (pertaining to the use or possession of illegal drugs) as they would take for a nonhandicapped student. (LAP)

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SECTION 504 AND THE LEGAL RIGHTS
OF DRUG AND ALCOHOL AFFECTED STUDENTS

I. Background

A. Section 504

1. 29 USC § 794
2. Enacted as part of the Rehabilitation Act of 1973.
3. Amended and expanded in 1974 and 1978.
4. "No otherwise qualified individual with handicaps * * * shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *."
5. Authorizes promulgation of implementing regulations.

B. Section 504 Regulations

1. 34 CFR Part 104
2. Adopted by the U.S. Department of Education's Office for Civil Rights ("OCR").
3. Defines "qualified handicapped person" as including a school age handicapped person. 34 CFR § 104.3(k)(2).
4. Defines "handicapped person" as any person who:

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- a. Has a physical or mental impairment which substantially limits one or more major life activities;
 - b. Has a record of such an impairment; or
 - c. Is regarded as having such an impairment. 34 CFR § 104.3(j)(1).
- 5. Defines "physical or mental impairment" broadly as including virtually any physiological disorder or condition, cosmetic disfigurement, anatomical loss, or mental or psychological disorder. 34 CFR § 104.4(j)(2)(i).
- 6. Defines "major life activities" as including functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- 7. Recipient of federal financial assistance may not, on the basis of handicap:
 - a. Deny opportunity to participate in or benefit from an aid, benefit, or service;
 - b. Afford opportunity that is not equal to that afforded others;
 - c. Provide an aid, benefit, or service that is not as effective as that provided to others;
 - d. Provide different or separate aid, benefits, or services unless necessary to be as effective as those provided to others; or
 - e. Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 CFR § 104.4(b).
- 8. Other significant requirements:
 - a. Program accessibility. 34 CFR § 104.21.

- b. Identification, location, and notification of all qualified handicapped persons residing within the district who are not receiving a public education. 34 CFR § 104.32.
- c. Free appropriate public education for all handicapped students in the district, regardless of the nature or severity of the handicap. 34 CFR § 104.33.
 - (1) "Appropriate education" means the provision of regular or special education and related aids and services that
 - (a) are designed to meet the student's individual educational needs as adequately as the needs of nonhandicapped persons are met and
 - (b) are based upon adherence to appropriate procedural requirements. 34 CFR § 104.33(b)(1).
 - (2) Implementation of an IEP developed in accordance with the Individuals With Disabilities Education Act ("IDEA") is not required, but is recognized as one means of meeting the standard for providing appropriate education. 34 CFR § 104.33(b)(2).
- d. Evaluation and placement. 34 CFR § 104.35.
 - (1) Preplacement evaluation and reevaluation in accordance with proscribed procedure. 34 CFR § 104.35(a), (b), and (d).
 - (2) Placement in the least restrictive educational setting appropriate in accordance with proscribed procedures. 34 CFR § 104.35(c) and § 104.34.
- e. Procedural safeguards. 34 CFR § 104.36.
 - (1) Notice.

- (2) Opportunity to examine relevant records.
- (3) Impartial hearing regarding disputes.
- (4) Review procedure.

f. Equal opportunity to participate in nonacademic and extracurricular services and activities. 34 CFR § 104.37.

C. Application to drug and alcohol dependency.

- 1. Section 504 regulations contain no reference to drug and alcohol dependency.
- 2. Appendix A to the regulations, however, states that drug addiction and alcoholism are "physical or mental impairments" for purposes of Section 504 and that drug addicts and alcoholics are therefore handicapped for purposes of Section 504 if their impairment substantially limits a major life activity. Appendix A, subpart A, paragraph 4.
- 3. OCR decisions.
 - a. Lake Washington School District No. 414.
 - (1) EHLR 257:611 (OCR 1985).
 - (2) District violated Section 504 by failure to evaluate students with suspected drug addiction or alcoholism.
 - b. In Re Dale Shroyer.
 - (1) EHLR 508:371 (SEA Or 1987).
 - (2) District violated Section 504 by failure to provide alcoholic student with notice, evaluation, and reasonable accommodations in connection with attendance policy.

II. ADA Amendments to Section 504

A. Americans With Disabilities Act of 1990 ("ADA").

1. PL 101-336, § 512(a), 104 Stat 327 (1990).
2. Extends protections similar to those in Section 504 to most disabled persons not covered by Section 504.
3. Includes broad prohibitions against employment discrimination.
4. Includes requirements regarding accessibility of public accommodations.
5. Amends 29 USC § 706(8) which contains the definition of "individual with handicaps" for purposes of Section 504.

B. Summary of impact on Section 504.

1. Definition of individual with handicaps narrowed to exclude persons "currently engaging in the illegal use of drugs" when the district acts on the basis of such use. 29 USC § 706(8)(C)(i).
2. Authorizes districts to take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who is currently engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. The due process procedures normally required under Section 504 (34 CFR § 104.36) are not applicable to such disciplinary actions. 29 USC § 706(8)(C)(iv).

C. Exclusion of current drug users.

1. The ADA added provisions to the definitional section of the Rehabilitation Act which excludes current illegal drug users from coverage under Section 504. 29 USC § 706(8)(C)(i)-(iii).
2. For purposes of Section 504, current drug users are no longer "individuals with handicaps" when the district acts on the basis of the student's drug use.

3. The term "drug" means a controlled substance, as defined in Schedules I through V of § 202 of the Controlled Substances Act (21 USC § 812). 29 USC § 706(22)(A).
4. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, other than under the supervision of a licensed health care professional or in accordance with uses authorized by the Controlled Substances Act. 29 USC § 706(22)(B).
5. A student may be excluded from participation or denied benefits based on current drug use.
6. The district is not required to determine whether the drug user could successfully participate in the district's educational programs before acting on the basis of the student's drug use. OCR Staff Memorandum, 17 EHLR 609, 612 (1991).
7. Although drug addiction remains a condition covered by Section 504, a current drug user is not a "qualified handicapped person" for purposes of Section 504 because he or she is not an "individual with handicaps" under the operative definition. Thus, persons suffering from drug addiction who are currently using illegal drugs are not protected under Section 504 when the district takes action based on their current use. OCR Staff Memorandum, 17 EHLR 609, 610 (1991).
8. The discussion in Appendix A regarding treatment of drug abusers for purposes of Section 504 is inconsistent with the revisions made by the ADA. OCR Staff Memorandum, 17 EHLR 609, 610-611 (1991).
9. Important limitations on effect of new exclusionary language.
 - a. Applies only when district acts on basis of illegal drug use.
 - b. Does not apply to an individual who:

- (1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs;
 - (2) Has been successfully rehabilitated and is no longer engaging in the illegal use of drugs;
 - (3) Is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs; or
 - (4) Is erroneously regarded as engaging in the illegal use of drugs. 29 USC § 706(C)(ii).
- c. Despite the new definition, an individual may not be excluded from the benefits of programs and activities providing health services and certain other services provided under subchapters I, II, and III of the Rehabilitation Act (29 USC §§ 720-777) on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services. 29 USC § 706(8)(C)(iii).
 - d. Mere possession or distribution of illegal drugs is insufficient for exclusion. Current use is required.
 - e. Does not apply to alcoholic students who are currently using alcohol but not illegal drugs. (But see discussion below regarding disciplinary action against such students.)

D. Discipline of drug or alcohol users.

- 1. The ADA also added a new subsection to the Rehabilitation Act of 1973 which allows school districts to take disciplinary action against handicapped students currently using illegal drugs or alcohol. 29 USC § 706(8)(C)(iv).
 - a. May be disciplined for use or possession of illegal drugs or alcohol to the same extent as nonhandicapped students.

- b. The due process procedures at 34 CFR § 104.36 do not apply to such disciplinary actions.
- 2. Such disciplinary action will not violate Section 504 even if the student is handicapped by conditions other than drug addiction or alcoholism. OCR Staff Memorandum, 17 EHLR 609, 611-612 (1991).
- 3. Previous OCR policy permitted districts to apply disciplinary policies regarding use, sale, or possession of alcohol or drugs to handicapped students in the same manner as to nonhandicapped students only when drug addiction or alcoholism was the sole handicapping condition. OCR Staff Memorandum, EHLR 307.05 (1988).
- 4. Mere possession or distribution of illegal drugs or alcohol does not result in a loss of protections unless the handicapped student is currently using drugs or alcohol.
- 5. **EXAMPLE:** A student with learning disabilities is caught selling drugs to another student. A search of his gym bag reveals additional illegal drugs and a half empty bottle of vodka.
 - a. If the district is able to prove that the handicapped student is currently using illegal drugs or alcohol, it may discipline the student for the possession and attempt to distribute illegal drugs and/or the possession of alcohol--without violating Section 504--as long as the disciplinary action is coextensive with discipline of nonhandicapped students. The district would not be required by Section 504 to reevaluate the student or afford the due process protections of 34 CFR § 104.36.
 - b. If, however, the district is unable to prove that the handicapped student is currently using drugs or alcohol, the procedural safeguards of Section 504 must be followed in connection with any disciplinary action.

- c. If the handicapped student has been found eligible under IDEA, the procedural safeguards of that statute still apply and may limit the district's right to discipline the handicapped student.

III. Conclusion

In connection with the provision of educational services, a current drug user is not covered by Section 504 because he or she is not an "individual with handicaps" for purposes of the Rehabilitation Act. In addition, districts may discipline a handicapped student for the use or possession of illegal drugs or alcohol without evaluating the student or following Section 504 due process requirements if the student is currently using drugs or alcohol. Such disciplinary action will not violate Section 504 as long as the handicapped student is treated the same as a nonhandicapped student would be treated.